IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 400 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARANBHAI VIRABHAI HARIJAN

Versus

STATE OF GUJARAT

Appearance:

MR HARESH N JOSHI for Petitioner

MR.K.G.SHETH,Learned APP no. 1

RULE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 18/09/2000

C.A.V.JUDGEMENT

1. The petitioner has filed the present petition under Articles 14, 21 and 226 of the Constitution of

India challenging the order of his externment dated 10.3.2000 passed in Externment Case No. 23 of 1999 by the learned Sub Divisional Magistrate, Gondal externing the petitioner out of the limits of the area stated in the order for a period of 2 years under Section 56 A and 56 B of the Bombay Police Act, 1951 (for short "the said Act"). The petitioner had also challenged the order in Appeal passed by the third respondent on 29.4.2000 under Section 60 of the said Act dismissing the said appeal of the petitioner and confirming the order of the learned Sub Divisional Magistrate, Gondal.

2. The petitioner was served with show cause notice dated 23.8.1999 placed at Annexure-A at page-20. There it was contended that the said Authority had received information that the petitioner was illegally possessing illicit liquor at Upleta. That he used to indulge in offences against the property and society. That he used to raise demand for molestation of the women and that he used to threaten them if they did not succumb to the demand of the petitioner. It was also alleged that the petitioner was a head strong person and, therefore, it was necessary to extern the petitioner out of the limits of the area stated in the said notice for a period of 2 years. After the said notice, necessary procedure was adopted and thereafter, learned Sub Divisional Magistrate, Gondal has passed order on 10.3.2000 at Annexure-B, at page-23 directing externment of the petitioner for a period of 2 years from the area stated in the order under Section 56 A & 56 B of the said Act.

3. The petitioner had preferred the appeal under Section 60 of the said Act before the third respondent which was dismissed on 28.4.2000 by the said Authority. Feeling aggrieved by the aforesaid two orders, the petitioner has preferred this petition before this court. It has been mainly contended here that the respondents have not recorded that the witnesses are not willing to come forward in public against the petitioner by reason of apprehension on their part with regard to safety of their property. It is further contended that while passing judgement and order the learned Sub Divisional Magistrate has placed reliance upon the so called private statement recorded by the police and order of externment has been passed. That the notice issued is bad in law as it is alleged in the said notice itself that some persons have given statement to the Police Inspector and Police Inspector had gone to the witnesses for recording the statement. That the intention of the Police Officer itself is suggestive of the fact that the victims have not come forward with their submission but the same is

recorded by the police by visiting their places. It has also been alleged that the impugned notice was issued for the breach of criminal offences under Section 56 A & 56 B whereas externment order relates to the breach of Prohibition Act and the said breach is defined under Section 57 of the said Act. That therefore the order has been passed by considering the said ground whereas notice did not cover the said ground and, therefore, the impugned order is illegal. That even the numbers of prohibition cases were not correctly mentioned and, therefore, there was non-appliction of mind. That the averments made in the show cause notice were vague. That the externment authority did not consider the depositions of the witnesses examined by the petitioner in his support and no reasons have been given for not believing them. That the F.I.R. was filed against the petitioner for offence punishable under Section 93 of the Bombay Prohibition Act, 1951 which was registered as Prohibition Case No. 167 of 1996 in which the petitioner was acquitted. That again another prohibition case no. 72 of 1998 was registered in which also the petitioner was acquitted. That though impugned order relate to the offence under the Indian Penal Code, no offence against the petitioner has been registered under the Indian Penal Code. That the petitioner has never been held guilty for any offence. That judgements and orders passed by the aforesaid two authorities are wholly illegal, erroneous and deserve to be quashed and set aside. The petitioner therefore prays that the present petition may be allowed and the externment order passed by the aforesaid two authorities be quashed and set aside.

4. At the admission stage, rule was issued and Mr. K.G.Sheth, learned APP appears for State. I have heard learned advocates for the parties and have perused the papers.

5. The learned advocate for the petitioner has contended that the petitioner had examined witnesses before the externing authority and their evidence has not been properly appreciated and considered by the said externing authority. Now, it is apparent from para-4 of the order of the externing authority at page-25 that the witnesses were examined by the petitioner before the said externing authority and that evidence has been referred by the said externing authority in order at page-25, 26 and 27. The written arguments placed on record by the petitioner before the said authority has been almost reproduced at page 27 in the said order. Thereafter, the evidence produced on behalf of the respondent has also been reproduced at page-31 onwards.

6. Now, considering the orders, it is clear that witness on behalf of the respondents PI Laxmansinh had deposed that there was some complaint against the petitioner but informants were not inclined to disclose their names. However, so far the petitioner is concerned, the witnesses said that there is no information on record before the Police Station to show that the petitioner was involved in offence against the properties and so far the prohibition cases are concerned, it has been contended that the officer did not know if the petitioner was acquitted in two cases filed against him under the provisions of Section 93 of the Bombay Prohibition Act. So far the witnesses of the petitioner are concerned, their evidence is discussed at page-33 onwards and the reasons do not appear to have been recorded to show that as to why evidence as given by those witnesses should be disbelieved. These witnesses have positively come forward with a case showing that the petitioner was not involved in the offence or illegal activities enumerated in the show cause notice. The authorities were required to properly consider the evidence.

7. In the case of Ramjibhai Popatbhai Kasundra (Patel) Vs. S.A.Ziba, Sub-Divisional Magistrate, Jamnagar, reported in 1999(2) GLH 38, there, it has been observed by this Court that when show cause notice contains vague allegations and when reference has been made to the three criminal cases and all of them resulted in acquittal, then, in that event, the order of externment cannot be sustained. It should be considered that so far as the show cause notice at page-20 is concerned, there is allegation that the petitioner was involved in offence relating to possession of illicit liquor but no details are there showing the Crime Register or criminal case number in which the petitioner was involved. Naturally, if the prohibition cases were filed against the petitioner then the said material could be easily available with the competent authority, but notice is silent with respect to the crime register number and criminal case number. Of all the cases in which the petitioner is said to have been involved. The Police Inspector has referred to some cases registered against the petitioner under the provisions of Bombay Prohibition Act. There he has stated that he was the Police Inspector working there at Upleta Police Station between 15.3.1999 to 18.2.2000. During that period the cases under the Bombay Prohibition Act were registered against the petitioner. The show cause notice was issued on 23.8.1999, even then, number of those prohibition

cases have not been mentioned in the said notice. Therefore, though the offences have been registered before the date of the notice, their numbers have not been referred. Therefore, it would not be appropriate for the competent authority to consider those cases as evidence against the petitioner. Moreover, the evidence produced in this behalf cannot be treated to have been considered after due application of mind. In that view of the matter, the order in question can be said to be suffering from the said infirmity.

8. In the case of Aswin Chandulal Jaishwal Vs. Deputy Commissioner of Police, reported in 1989 (2)GLR 1429 it was observed as follows :

> "It appears from the notice that the main allegation against the petitioner is that he is carrying on his bootlegging activities in that particular pocket within the Vali Police Station. His activities are not spread in other parts of the City. If at all any cases were filed, either under the Prohibition Act or under Chapter XVI of the Indian penal code, that fact should have been stated in the notice. In absence of any such allegations, the notice should be termed as vague and that has deprived the petitioner of the reasonable opportunity of tendering the explanation.

Applying the said principle to the facts of this case, it is clear that the petitioner has not been served with notice and on this point the orders have not been passed under Section 57 of the said Act. Therefore, the said principle will apply to the present case before me.

9. In the case of Suresh Soma @ Dule Harijan Vs. State of Gujarat, reported in 2000 (1) GLH 547, it has been laid down that the ground which is not stated in the notice issued under Section 59 cannot be considered while passing the order of externment.

10. In another case of Suresh Haribhai Marathi Vs. Deputy Commissioner of Police, Surat City, reported in 1991 (1) GLR 296, it has been laid down by the Division Bench of this Court that where an order of detention is based on an incident, and if a criminal court has on appreciation of evidence, acquitted the detenu of the charge arising out of that incident, the order would be bad. In the present case also, the petitioner was acquitted from offence alleged to have been committed by him. Therefore, this evidence cannot be taken into

consideration by the externing authority while passing the externment order against the petitioner and since the said evidence has also been taken into account, it would amount to non-application of mind. The authority ought to have considered that if those cases have been concluded and whether petitioner was exonerated or whether the cases were pending. It is required for the authority to keep in mind these aspects while passing the orders against the petitioner, the same does not appear to have been done. The petitioner has positively stated before the authority that he was acquitted from all offences registered against him under the provisions of Bombay Prohibition Act and at least two cases have been referred to by him. This would show that there is a non application of mind on the part of the externing authority as it proceed on a footing of prohibition cases and the petitioner was acquitted in these cases.

11. One more decision was relied upon by the learned advocate for the petitioner in the case of Balvantsingh Nanio Kalyansingh Rajput Vs. Deputy Commissioner of Police, Vadodara and Another, reported in 1999(1) GLH 207. There it has been observed that last undisclosed witness was examined on 21.2.1997 and the externment order was passed on 1.10.1997. Therefore there is a delay of about 9 months and same has not been explained by the authority. Therefore, the externment order was quashed. It is difficult to find those details in the present case. Therefore, It cannot be said that the aforesaid decision will apply to the facts of the case before me.

Another principle enunciated in that decision is that when no reason is given why uncrossexamined statements could not be believed and on what material the authority made observation that the witnesses of the petitioners were suppressing material facts then such non explanation would also amount to non application of mind. Here it appears that the witnesses of the petitioner are cross-examined but the discussion on the said evidence shows that the evidence of the witnesses remained unshaken and, therefore, the authority ought to have appreciated that position while disbelieving the evidence of those witnesses. Reasons for rejecting their statments have not been recorded. This way of dealing with defence witnesses amounts to non-application of mind on the part of the externing authority.

12. It has also been stated in the notice that the petitioner can not be restrained from causing damage to the properties of the public at large if he is not

externed. However, record shows that no evidence in this respect has been registered against the petitioner. There is no material to show that the petitioner was involved in such offence. It does not disclose from the record as to on what basis this notice was issued to the petitioner showing that the petitioner was causing damage to the properties of the public at large. This also shows non-application of mind on the part of the externing authority.

13. In the aforesaid view of the matter, I am of the view that the case against the petitioner suffers from several infirmities and the same will amount to non-application on mind on the part of the externing authority. In that view of the matter, the order of externment against the petitioner cannot be sustained in the eye of law.

14. The result is that the present petition succeeds and the externment order passed against the petitioner in Externment Case No. 23/99 by the learned Sub Divisional Magistrate, Gondal and confirmed in Externment Appeal No. 68/2000 are ordered to be quashed and set aside. Rule made absolute with no order as to costs. Direct service is permitted.

(D.P.Buch,J)
(vipul)